Dato' HM Shah & Ors v Dato' Abdullah bin Ahmad

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NOS 02-131 OF 1990 AND 02-141 OF 1990
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF SCJ AND WAN YAHYA J
30 OCTOBER 1990

Contract — Employment contract — Appointment as executive chairman and managing director of company — Removal of board of directors — Whether there is implied negative undertaking in the agreement of employment — Injunction to enforce negative undertaking — Specific Relief Act 1950, s 55 — Companies Act 1965, s 128

The respondent in this case had been appointed as the executive chairman and managing director of a company for a period of three years from 1 January 1989 to 31 December 1991. At a meeting of the board of directors of the company, the board removed the respondent as chairman of the company and appointed the first appellant in his place. At the same meeting the board also suspended the respondent of his executive powers and duties as managing director of the company. The respondent applied to the High Court and obtained ex parte reliefs. Subsequently on application to the High Court and after hearing the parties the learned judge of the High Court:

(a) dissolved the ex parte injunction granted on 5 October 1989 concerning the respondent remaining in office as executive chairman and managing director of the company and the exercise by him of the powers and duties of the holder of such office; and
(b) affirmed the ex parte injunction of the same date restraining the appellant from acting as chairman of the company. [See [1990] 3 MLJ 505.]

The conclusions of the learned judge was to the effect that the purported removal from office of the respondent as chairman of the company and suspension of his executive powers as managing director of the same by the board of directors of the company on 2 October 1989 did not put an end to the contract of service between him and the company. It only operates as a repudiation of the contract by the company. The contract will only be determined when the repudiation is accepted by the respondent.

Since the repudiation has not been accepted as obviously shown by his challenge, the contract of employment still subsists. Although under s 20(1)(b) and s 54(f) of the Specific Relief Act 1950 specific performance in this case is not possible, the respondent is not prevented from applying for an injunction to enforce the performance of any implied negative undertaking in the agreement. The appellants appealed.

Held, allowing the appeal:

(1) Section 55 of the Specific Relief Act 1950 does not say that every affirmative agreement includes by necessary implication a negative agreement to refrain from doing certain things. It is a question of interpretation in each case whether a particular agreement can be said to have a negative covenant, express or implied.

(2) In the decided cases the implied stipulation was against the employee, not the employer. In practice, it may perhaps be much more difficult to find in a service contract an implied undertaking against an employer.

(3) Section 128 of the Companies Act 1965 provides for removal of a director of a public company by ordinary resolution notwithstanding anything in the company's memorandum or in any agreement between the company and the director.

(4) An implied stipulation cannot properly be read into the agreement between the company and the respondent in this case and the appeal must therefore be allowed.

[Bahasa Malaysia summary

Responden di dalam kes ini telah dilantik sebagai pengerusi eksekutif dan pengarah pengurus sebuah syarikat untuk masa tiga tahun dari 1 Januari 1989 hingga 31 Disember 1991. Di suatu mesyuarat lembaga pengarah syarikat itu, lembaga itu telah memberhentikan responden sebagai pengerusi syarikat itu dan melantik perayu pertama ditempatnya. Di mesyuarat yang sama lembaga telah menggantung kuasa responden dari kuasa eksekutifnya sebagai pengarah pengurus syarikat itu. Responden telah memohon ke Mahkamah Tinggi dan telah mendapat beberapa perintah sementara. Kemudiannya apabila permohonan dibuat kepada Mahkamah Tinggi dan selepas mendengar pihak-pihak yang berkenaan yang arif hakim Mahkamah Tinggi telah:

(a) membubarkan injunksi ex parte yang diberi pada 5 Oktober 1989 mengenai responden terus memegang jawatan sebagai pengerusi eksekutif dan pengarah pengurus syarikat itu dan menjalan kuasa dan tugas pemegang jawatan itu; dan
(b) mengesahkan injunksi ex parte pada tarikh yang sama menghalang perayu dari bertindak sebagai pengerusi syarikat itu. [Sila lihat [1990] 3 MLJ 505.]

Pendapat yang arif hakim itu adalah bahawa apa yang dikatakan penyingkiran responden dari jawatannya sebagai pengerusi syarikat itu dan penggantungan kuasa eksekutif sebagai pengarah pengurus syarikat itu oleh lembaga pengarah syarikat itu pada 2 Oktober 1989 tidak menamatkan kontrak pekerjaan antaranya dan syarikat itu. Ia hanya berkesan sebagai penolakan kontrak itu oleh syarikat itu. Kontrak itu akan tamat hanya apabila penolakan itu diterima oleh responden. Oleh kerana penolakan itu belum diterima oleh responden seperti yang nyata dari tindakan yang diambil olehnya, kontrak pekerjaan itu masih wujud. Sungguhpun mengikut undang-undang di Malaysia pelaksanaan tertentu tidak boleh diadakan mengikut ss 20(1)(b) dan 54(f) Akta Pelaksanaan Tertentu 1950, responden tidak dihalang memohon injunksi untuk menguatkuasakan perlaksanaan apa-apa akujanji negatif yang tersirat. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Seksyen 55 Akta Pelaksanaan Tertentu 1950 tidak berkata bahawa tiap-tiap perjanjian affirmatif untuk membuat sesuatu ada termasuk melalui implikasi semestinya perjanjian negatif untuk tidak melakukan apa-apa perkara. Adalah suatu perkara untuk tafsiran di tiap-tiap kes samada sesuatu perjanjian itu boleh dikatakan mempunyai waadah negatif, ternyata atau tersirat.

(2) Didalam kes-kes yang telah diputuskan syarat yang tersirat adalah terhadap pekerja dan bukan terhadap majikan. Mungkin didalam amalannya adalah lebih sukar mendapatikan didalam kontrak pekerjaan akujanji tersirat terhadap seorang majikan.

(3) Seksyen 128 Akta Syarikat 1965 membolehkan seorang pengarah syarikat awam diberhentikan dengan reso-

lusi biasa syarikat itu walaupun terdapat apa-apa yang berlawanan didalam memorandum syarikat itu atau didalam manamana perjanjian antara syarikat dan pengarah itu.

(5) Akujanji tersirat tidak boleh dengan sewajarnya difahami didalam perjanjian antara syarikat dan responden didalam kes ini dan oleh kerana itu rayuan hendaklah dibenarkan.]

Cases referred to

1 *Marshall (Thomas) (Exports) Ltd* v *Guinle* [1979] Ch 227 (refd)
2 *Vine* v *National Dock Labour Board* [1956] 1 QB 658 (refd)
3 *Vine* v *National Dock Labour Board* [1957] AC 488 (refd)
4 *Denmark Productions Ltd* v *Boscobel Productions Ltd* [1969] 1 QB 699 (refd)
5 *Broome (Selangor) Rubber Plantations* v *RH Whitley* (1919) 1 FMLR 365 (refd)
6 *Pertama Cabaret Nite Club Sdn Bhd* v *Roman Tam* [1981] 1 MLJ 149 (refd)
7 *Rubinstein Co* v *Francis* AIR 1930 Lah 597 (refd)
8 *Vinod Chandra* v *Virekanand Mills* AIR 1967 Guj 255 (refd)
9 *Lumley* v *Wagner* [1843-60] All ER 368 (refd)
10 *Whitwood Chemical Co* v *Hardman* [1891] 2 Ch 416 (refd)

Appeal from: Suit No 55-22-774-89 (High Court, Kuala Lumpur)

KS Narayanan for the appellants.
PS Ranjan for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): By a contract of employment, the plaintiff in the court below, now the appellant (Dato' Abdullah Ahmad) in SCCA No 02-141 of 1990 was employed by Syarikat Permodalan Kebangsaan Bhd 'SPK', the first defendant company in the court below, to serve SPK as its executive chairman and managing director for a period of three years from 1 January 1989 to 31 December 1991.

SPK is a public company listed on the Bumiputra Stock Exchange and has large investments in various companies. At a meeting of the board of directors of SPK on 2 October 1989 the board removed Dato' Abdullah Ahmad as chairman of SPK and Dato' HM Shah was appointed in his place. At the same meeting the board also suspended Dato' Abdullah Ahmad of his executive powers and duties as managing director of SPK.

Dissatisfied, Dato' Abdullah Ahmad sought and obtained certain ex parte reliefs from the High Court on 5 October 1989.

Both the appeal and the cross-appeal before us arose from the decision of the learned judge of the High Court who after hearing inter partes:

(a) dissolved the ex parte injunction granted on 5 October 1989 concerning Dato' Abdullah Ahmad remaining in office as executive chairman and managing director of SPK and the exercise by him of the powers and duties of the holder of such office; and
(b) affirmed the ex parte injunction of the same date restraining Dato' HM Shah from acting as chairman of SPK.

There were lengthy arguments before the learned judge and the learned judge came out with a well researched grounds of judgment [see [1990] 3 MLJ 505] which subsequently also came to be discussed in an excellent article in the Current Law Journal [[1990] 2 CLJ i].

The conclusions of the learned judge may be summarized simply as follows. The purported removal from office of Dato' Abdullah Ahmad as chairman of SPK and suspension of his executive powers as managing director of the same by the board of directors of SPK on 2 October 1989 did not put an end to the contract of service between him and SPK. It only operates as a repudiation of the contract by SPK. The contract will only be determined when the repudiation is accepted by Dato' Abdullah Ahmad. Since the repudiation has not been accepted, as obviously shown by his challenge, the contract of employment still subsists. Although under our law, namely, s 20(1)(b) and s 54(f) of the Specific Relief Act 1950 (Cap 137) specific performance in this case is not possible, Dato' Abdullah Ahmad is not prevented from applying for an injunction to enforce the performance of any implied negative undertaking in the agreement. The rationale is as follows. Because it is a contract for personal service, Dato' Abdullah Ahmad is not entitled to a decree of specific performance to continue him as executive chairman and managing director. However, since he has performed his contract as far as it is binding on him, although SPK's positive undertaking to employ him as executive chairman and managing director until 31 December 1991 cannot be enforced by specific performance, an injunction may be granted against SPK to enforce any express or implied negative undertaking by SPK. The learned judge found on his reading of the contract of employment in question that there is on the part of SPK an implied negative stipulation not to appoint someone else as chairman of SPK until the expiration of the period of the contract, that is, 31 December 1991. Based on his finding that there is an implied negative stipulation the learned judge refused to dissolve the ex parte injunction granted by him on 5 October 1989 to restrain Dato' HM Shah from acting as chairman of SPK.

The law on repudiation of a contract in a contract of employment is by no means certain and views are divided whether contracts of employment are excepted from the general rule that repudiation does not determine the contract until accepted. The opposing authorities are found in the judgment of the learned judge.

Megarry VC in *Thomas Marshall (Exports) Ltd* v *Guinle*[1] after a detailed examination of the authorities took the view that contracts of employment are no exception to the general rule.

The other view is as expressed by Jenkins LJ in *Vine* v *National Dock Labour Board*[2] that in the ordinary case of master and servant contract because of the peculiar nature of the contract the repudiation or the wrongful dismissal puts an end to the contract and only a claim for damages can arise. On appeal Viscount Kilmuir LC said that in the ordinary master and servant case 'if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract.' See *Vine* v *National Dock Labour Board*[3] at p 500.

In *Denmark Productions Ltd* v *Boscobel Productions Ltd*[4] both Salmon and Harman LJJ agreed that if a man employed under a contract of personal service was dismissed it is clear that he could not treat the contract as still subsisting and claim remunerations but must sue for damages for the wrongful dismissal.

At the outset of his argument in reply in the appeal in SCCA No 02-131 of 1990 Mr Ranjan for Dato' Abdullah Ahmad stated that circumstances had changed after the injunctions were issued. He said we were confronted with 'practical realities' as events had changed in that the majority of the members of the board of SPK had by then 'restored Dato' Abdullah Ahmad to his rightful place'. Indeed only three directors of SPK appealed against the injunction, ie Dato' HM Shah and two others. Nothing developed from the disclosure by Mr Ranjan except perhaps to give the impression that the appeal may be only of academic interest.

If one goes back to basic principles the disclosure of Mr Ranjan did highlight a vital aspect of the appeal. In a civil proceeding parties must abide by their pleadings. In this case the court's jurisdiction is confined to the statement of claim of Dato' Abdullah Ahmad. The injunctions sought by Dato' Abdullah Ahmad were interlocutory. The defendants had not filed their defence. Paragraph 5 of the statement of claim reads as follows:

> The purported removal of the plaintiff from the office of chairman and the purported suspension of the plaintiff from the office of executive chairman and managing director are illegal, null and void and in breach of the said contract on the grounds, inter alia, that the plaintiff was not given sufficient notice of the said meeting and was not given an opportunity to be heard.

During the course of submission in the application for the interlocutory injunction, counsel for Dato' Abdullah Ahmad referred both to the articles of the company and the agreement between SPK and Dato' Abdullah Ahmad at p 58 as follows:

> In the present case, he was elected chairman (under the articles) and appointed (chairman and managing director) by the agreement A1 for a period of three years. In other words, he can only be removed as chairman subject to the contract.

After counsel referred to the committee of enquiry appointed by the board of SPK the learned judge tried to frame the issue before him then as appears in the note as follows:

> What you are trying to say is that his appointment can only be terminated under the agreement and not by this committee of enquiry.

Again during the inter partes hearing the same counsel for Dato' Abdullah Ahmad submitted that:

> What I am trying to say is that the jurisdiction of the court is established by the statement of claim. What is in issue is the legality of the contract.

The issue was still not crystallized but counsel during the inter partes hearing at p 73 submitted as follows:

> In the present case the plaintiff was removed from office as chairman without any reason being given and his executive powers were suspended on vague grounds that an investigation was to be undertaken into the validity of the contract.

What was the background of the conflict? The meeting of the board of SPK on 2 October 1989 was apparently prompted by the wishes of most of the members of the board to refer the agreement back to the general meeting. One of the provisions under the agreement which caused unhappiness was the provision for the payment of $660,000 as gratuity to Dato' Abdullah Ahmad for three years service under the agreement while the company was not making any profit. The contract between Dato' Abdullah Ahmad and SPK in question was the second contract. The first contract was executed on 4 March 1986 which also appointed Dato' Abdullah Ahmad as chairman and managing director of SPK until 31 December 1988.

In the affidavit of Dato' HM Shah he affirmed that the resolutions to replace the chairman and suspend his executive powers as managing director were passed in the best interest of the shareholders of SPK. In other words the board wanted to place the matter back to the general meeting to decide under its articles. Matters relating to renumeration of Dato' Abdullah Ahmad were already raised at the annual general meeting of SPK on 30 September 1989, ie barely two days before the meeting of the board.

What appears here is that there was the fact of repudiation which was not accepted and this the learned judge took as a starting point of his dissertation. Because the matter is still in interlocutory stage the point whether the removal of Dato' Abdullah Ahmad was wrongful or according to contract was raised but never really argued nor dealt with by the judge. The contract between Dato' Abdullah Ahmad and SPK must also be

looked at in the context of the articles of SPK and the Companies Act 1965.

However, for the limited purpose of resolving the appeal we have to consider whether the learned judge was correct in his view of the implied negative stipulation.

The learned judge affirmed the injunction based on what he found to be an implied negative stipulation in the agreement. In his judgment he said (p 44 of the appeal record):

> The defendant company has agreed to employ the plaintiff as its executive chairman and managing director until 31 December 1991. The implied negative agreement is that the defendant company will not employ someone else as its chairman or managing director until the expiry of the plaintiff's period of employment . . . The positive agreement by the defendant company to employ the plaintiff as its executive chairman and managing director cannot be enforced by specific performance or injunction; see s 20(1)(b) and s 54(f) of the Specific Relief Act 1950. As such, I find that there is, therefore, no justification for the injunctions, which concern the plaintiff remaining in office as executive chairman and managing director and the exercise by the plaintiff of the powers and duties of the holder of such office, to continue to remain in force. I therefore allow the application to discharge these two injunctions.
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> In the result, only the first injunction remains, namely, the injunction which restrains the second defendant from exercising the powers and duties of the office of chairman of the first defendant company.

The first thing to notice here is that the agreement between Dato' Abdullah Ahmad and SPK is not the same as any ordinary employer/employee agreement. In the instant case the agreement contains a number of provisions concerning termination. In cl 1 of the agreement itself it is stated that SPK shall employ Dato' Abdullah Ahmad as an executive chairman and managing director and subject to the provisions for determination of the agreement such employment shall be for a period of three years until 31 December 1991. Then we have cl 22 dealing with incapacity and SPK's right to terminate the agreement. Clause 23 deals with summary termination by SPK in certain events. Then there is the arbitration cl 27 which specifically provides for arbitration if any dispute arises from the agreement or in the construction of the agreement. In short, the agreement between SPK and Dato' Abdullah Ahmad is not an ordinary master and servant contract. Other factors come into play and need to be looked into.

True that a negative agreement need not be expressed. It may be implied. The question is only whether a negative covenant can probably be implied in a particular agreement. For this purpose we have to look at the agreement itself.

Section 55 of the Specific Relief Act 1950 does not say that every affirmative agreement includes by necessary implication a negative agreement to refrain from doing certain things. It is a question of interpretation in each case whether a particular agreement can be said to have a negative covenant, express or implied.

Section 55 of the Specific Relief Act 1950 provides as follows:

> Notwithstanding section 54(f), where a contract comprises an affirmative agreement to do a certain act, *coupled* with a negative agreement, *express or implied*, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:
>
> Provided that the applicant has not failed to perform the contract so far as it is binding on him. (Emphasis provided.)

In this country an old case *Broome (Selangor) Rubber Plantations* v *RH Whitley*[5] which was also cited in *Pertama Cabaret Nite Club Sdn Bhd* v *Roman Tam*[6] dealt with s 55 of the Specific Relief Act 1950. In *Broome (Selangor) Rubber Plantations* v *RH Whitley*[5] the defendant unilaterally terminated the contract of employment saying that he had a better position elsewhere. His employers sued for an injunction. It was held that under s 57 of the Specific Relief Enactment then (the forerunner of the present s 55) the plaintiffs were entitled to an injunction restraining the defendant from entering into employment elsewhere as manager or assistant relying on the implied stipulation. But there the learned judge found there was no provision in the agreement under which Whitley could determine his service by any such notice.

In an Indian decision *Rubinstein Co* v *Francis*[7] dealing with s 57 of the Indian Specific Relief Act (s 55 of our Act) the judgment reads:

> The learned counsel for the appellants has relied on s 57, Specific Relief Act, but that section does not say that every affirmative contract includes by necessary implication a negative agreement to refrain from doing certain things. It is, therefore, a question of interpretation in each case whether a particular contract can be said to have a negative covenant express or implied contained within it. I find a case reported in 75 Law Times, p 528, which is practically on all fours with this case. There the learned judges have held that the mere use of the word 'exclusively' does not imply a negative covenant to refrain from service of other people and the learned judges, therefore, refused the injunction on that ground.

In another Indian decision *Vinod Chandra* v *Vivekanand Mills*[8] it was held that:

> The presence of a mere term in the service contract that the employee must work with the company in a particular capacity for a certain number of years will not, by itself, imply a negative stipulation that he ought not to serve any other before the term expires. Something more in the

> nature of a distinct negative stipulation is necessary before an injunction can issue restraining the defendant from acting contrary to the term.

In *Pertama Cabaret Nite Club Sdn Bhd* v *Roman Tam*[6] the Federal Court considered cl 15 of the agreement in case of breach or misconduct of the singer and found there was indeed side by side with the stipulation to sing in the appellant's night club for a few days also an undertaking by the singer not to sing elsewhere for a certain period. In *Lumley* v *Wagner*[9] too the contract also contained both positive and negative stipulations, the negative stipulation being that the defendant was not to sing for anyone else during the agreed period. The negative stipulation was 'superadded' said Lord St Leonard LC although he was also of the opinion that 'even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered.' Also according to the learned Lord Chancellor the jurisdiction to restrain Johanna Wagner from the commission of an act which she had bound herself not to do 'is wholly within the power of the court, and being of the opinion that it is a proper case for interfering.'

When we speak of the implied stipulation a useful guideline can be found in *Whitwood Chemical Co* v *Hardman.*[10] There the manager of a manufacturing company agreed to give during a specific term 'the whole of his time to the company's business'. Lindley LJ described the principle at p 426:

> Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on ad infinitum; but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The court has never gone that length, and I do not suppose that it ever will.

It is to be noticed that in each of these cases the implied stipulation was against the employee, not the employer. In practice it may perhaps be much more difficult to find in a service contract an implied undertaking operating against an employer.

Returning to our case it is also to be noticed that s 128 of the Companies Act 1965 provides for removal of a director of a public company by ordinary resolution *notwithstanding* anything in the company's memorandum or in any agreement between the company and the director.

Our conclusion is that an implied stipulation cannot properly be read into the agreement between SPK and Dato' Abdullah Ahmad.

We accordingly allowed the appeal with costs. Immediately after our decision to allow the appeal Mr Ranjan withdrew the cross-appeal and the cross-appeal was accordingly dismissed but with no order as to costs.

Appeal allowed.

Solicitors: *KS Narayanan & Associates*; *PS Ranjan & Co.*

Reported by *Prof Ahmad Ibrahim*

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-454-89
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF SCJ AND WAN YAHYA J
29 OCTOBER 1990

Companies and Corporations — Winding-up — Insolvency of company — Company which fails to pay its debt — Prima facie right of creditor to petition for winding up — Discretion of court

In this case the appellant had presented a petition for the winding up of the respondent company. The respondent company had taken a loan from the American International Assurance Co Ltd, the repayment of which together with interest and costs was guaranteed by the appellant. The guarantee agreement between the respondent company and the appellant, inter alia, provided that if the guarantor notified the respondent company that AIA had required the guarantor to pay any part of the amount guaranteed the respondent company should forthwith on demand pay such amount to the guarantor notwithstanding that the sum called for might not have been properly due. AIA had demanded payment from the appellant of the sum of $33,323,593.91 pursuant to the guarantee. The appellant had demanded this sum from the respondent company but the respondent had failed or refused or neglected to pay the said sum. The petition for winding up also relied on the profit and loss account of the respondent company which showed that liabilities exceed assets and that the respondent company had incurred a loss, and also on just and equitable grounds that the company should be wound up. The respondent company filed a notice of motion seeking that the winding-up petition be set aside on the grounds that the petitioner was not entitled to present the petition and that the petition did not disclose a cause of action. The learned trial judge set aside the petition on the sole ground that in his view the petitioner had no locus standi to present the petition (see [1990] 1 MLJ 282). He stated that he was 'far from satisfied that the petitioner was at the material time qualified to petition the court as it did'. The learned judge took the view that the demand for payment was stage-managed and he also referred to a sharing formula agreed to by the creditors of the company which he regarded as a moratorium of the claims against the company.

The appellant appealed. It appeared that at the time of the appeal all the moneys due had been paid.